United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1467

To be argued by
THOMAS M. FORTLIN

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1467

SALVATORE MANGIAMELLI,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTLIN,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Salvatore Mangiamelli appeals from an order entered February 26, 1974 in the United States District Court for the Southern District of New York by the Honorable Edmund L. Palmieri, United States District Judge, denying without a hearing Mangiamelli's motion, pursuant to Title 28, United States Code, Section 2255 to vacate his conviction and sentence.

On September 11, 1972, after a trial before Judge Palmieri and a jury, Mangiamelli was found guilty on one count of conspiracy to transport and sell stolen securities, valued in excess of $5,000, in interstate commerce, in violation of Title 18, United States Code, Section 371. On November 20, 1972, Mangiamelli was sentenced to a term of imprisonment of five years and a $10,000 committed fine.

Mangiamelli is currently serving that sentence. This Court unanimously affirmed Mangiamelli's conviction from the bench, *United States* v. *Mangiamelli,* 472 F.2d 1404 (2d Cir. 1973) and the Supreme Court denied certiorari, *Mangaiamelli* [*sic*] v. *United States,* 412 U.S. 939 (1973).

Statement of Facts

The facts which gave rise to this petition are as follows.

At defendant's trial for interstate transportation of stolen securities Albert J. Brackley, Esq., his attorney, introduced in evidence as a defense exhibit an indictment. In preparing exhibits for the jury he submitted a copy of this indictment which had the following notation on the back:

> "Ciprio's [a co-defendant, whose case had been severed] murder inadmissible since prejudice obliterates it minor relevance and the jury might infer mango had something to do with it, etc." (26a).*

This copy of the indictment was submitted to the jury.

Shortly after the jury began its deliberations, the Foreman addressed a note to the Court, which read as follows:

> "Jury Foreman requests a word with Judge. The annotated copy of the indictment was mistakenly sent into the jury and the notes and inadmissible evidence were seen" (26a).

On hearing the note read, defendant's counsel stated to the Court, "I must accept full responsibility for the error, if it is error" (26a) and moved for a mistrial. The motion was denied with leave to renew the motion if a guilty verdict was returned. The Court then obtained a fresh copy of the defense exhibit and sent the new copy of the

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* Unless otherwise indicated, all references are to pages of the Appellant's Appendix.

exhibit to the jury with a note to the jury instructing them to disregard any of the notations which they may have read on the original exhibit. Mangiamelli's counsel consented to the Court's procedure and specifically requested that no oral instructions be given to the jury:

> "The Court: Mr. Brackley, you consented to that note being sent in immediately?
>
> Mr. Brackley: Yes.
>
> Mr. Rowland: And you did not want any instructions to the jury?
>
> Mr. Brackley: No" (26a).

The jury deliberated for two days after receiving the Court's note and ultimately convicted the defendant.

After the return of the verdict, the Court in the presence of counsel, but not the defendant, called the jury foreman into chambers and questioned the foreman regarding the notations on the original defense exhibit. The foreman stated that when the jury became aware of the notations and before informing the Court of the problem they took a vote and voted unanimously that the notations would not bias their judgment (27a). Mangiamelli's counsel did not renew the motion for a mistrial.

Defendant appealed from his conviction and raised the same issues that he seeks to relitigate here. On appeal defendant was represented by the firm of Fontana and Geoly. They filed an eighty-three page brief prepared by four lawyers raising eight points. Defendant's trial counsel did not participate in writing the appellate brief. Ten pages of that brief related to the procedures followed by the court on learning of the notation on the back of the indictment submitted by defendant's trial counsel. Point Seven of the Brief was that "The Court's refusal to declare a mistrial *sua sponte* because of the prejudicial reference to

Ciprio's murder noted on papers inadvertently taken to the jury room, or to poll the jury at its own behest, rendered the jury verdict a nullity and deprived appellant of a fair trial and due process of law."

The Government responded to Mangiamelli's allegations in its brief and devoted three pages thereto. This Court on March 1, 1973 unanimously affirmed defendant's conviction from the bench. 472 F.2d 1404. The Supreme Court denied certiorari, *Mangaiamelli* [*sic*] v. *United States,* 412 U.S. 939 (1973).

In September of this year, Mangiamelli, this time represented by a third set of lawyers, the firm of Rosenberg, Fusfield & Lopez, filed this motion pursuant to 28 U.S.C. Section 2255 attempting to relitigate and, in fact, seeking a redetermination of the propriety of the procedures followed by the District Court on learning that the notation had inadvertently been communicated to the jury. The defendant's motion does not allege that there are new facts. It does not challenge the regularity or sufficiency of the prior proceedings. No claim is made that a redetermination is required in the interests of justice.

ARGUMENT

POINT I

The District Court Properly Denied the Section 2255 Motion as An Attempt to Relitigate Issues Decided Adversely To Mangiamelli on Appeal.

In denying the petition, Judge Palmieri stated:

> "This petition is clearly an attempt to relitigate issues which were raised and decided against petitioner on appeal. Petitioner's claims of prejudice with respect to the occurrences at his trial pertaining to the submission of inadmissible evidence to the jury and subsequent events in curing that error (arising by fault of petitioner's defense counsel) were a major basis for his appeal from the judgment.
>
> "The contentions raised here based on that series of events are unquestionably mere recharacterizations of the point raised on appeal, *Sanders* v. *United States,* 373 U.S. 1, 16 (1963), and as such have already been determined adversely to petitioner and disentitle him to collaterally attack the same occurrences by way of this § 2255 application. *Kaufman* v. *United States,* 394 U.S. 217, 227 n. 8, 230 (1969), *citing with approval, Thornton* v. *United States,* 368 F.2d 822, 833 (D.C. Cir. 1966) (dissenting opinion of Wright, J.).
>
> "Since it does not appear, nor does petitioner demonstrate, nor indeed even allege, that a redetermination of these issues would serve the ends of justice, 28 U.S.C. § 2244(a) (1970), this Court, in the exercise of its discretion, declines the invitation to permit relitigation of issues already heard and adjudicated.

> "Petitioner alleges that his absence during these particular events resulted in abridgments of his rights to confrontation, due process and equal protection of the laws. This too constitutes an attempt to collaterally attack a judgment on grounds previously raised on appeal. This kind of contention must be regarded as a precursor to a serialized set of petitions raising every conceivable argument with respect to these occurrences they they occur to the petitioner. While petitioner is entitled to an unimpaired right of appeal or other avenues of review, this particular track does not fall within the purview of those rights and petitioner is not entitled to pursue this course" (5a-6a).

It is well established that petitioner "cannot raise on a section 2255 motion issues which were actually disposed of on direct appeal." *United States* v. *Gordon,* 433 F.2d 313, 314 (2d Cir. 1970) (per curiam); *Panico* v. *United States,* 412 F.2d 1151, 1154 (2d Cir. 1969), *cert. denied,* 397 U.S. 921 (1970); *Castellana* v. *United States,* 378 F.2d 231, 233 (2d Cir. 1967); *United States* v. *Thompson,* 261 F.2d 809, 810 (2d Cir. 1958), *cert. denied,* 359 U.S. 967 (1959).

Appellant's contention that because this Court affirmed without opinion its decision was not on the merits (Appellant's Brief, p. 10) is frivolous on its face.

POINT II

Mangiamelli's Deprivation of Counsel Argument is Without Merit.

Mangiamelli also claims that, by virtue of the same events which provide the grounds for his other claims, he was denied the effective assistance of counsel at trial. This claim is without merit. It is notable that on direct appeal the team of lawyers who prepared the brief, which did not include Mangiamelli's trial counsel, made no such claim. Judge Palmieri independently reviewed the record and concluded:

> "Moreover, after carefully reexamining the record, particularly with respect to the events in question, we conclude that petitioner was adequately represented at the trial by defense counsel and that the failure to demand petitioner's presence at the pertinent time was not such error as to shock the conscience of the Court and to render the proceedings a farce and mockery of justice. *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233, 237 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States ex rel. Walker* v. *Henderson*, [492 F.2d 1311, 1312-13 (2d Cir. 1974)]. *See also United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364, 374 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963) (poor and even disastrous tactics by experienced counsel do not give rise to denial of due process)" (7a).

CONCLUSION

The Order of the District Court denying the Motion pursuant to 28 U.S.C. § 2255 without hearing should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of June, 1974 he served ~~a~~ two copies of the within Brief for the U.S.A., final form, by placing the same in a properly postpaid franked envelope addressed:

FRANK LOPEZ, ESQ.
Messrs. Rosenberg, Fusfield and Lopez
31 Smith Street
Brooklyn, New York 11201

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas M. Fortuin

THOMAS M. FORTUIN

Sworn to before me this
20th day of June, 1974

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975